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No. 395.

# In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

*v.*

THE UNITED STATES.

*IN ERROR TO THE COURT OF APPEALS, DISTRICT OF COLUMBIA.*

**MOTION TO DISMISS, AND BRIEF IN SUPPORT THEREOF.**

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**MOTION TO DISMISS, AND BRIEF IN SUPPORT THEREOF.**

Comes now the Solicitor-General on behalf of the defendant in error in the above-entitled cause, and moves the court to dismiss the same for want of jurisdiction.

The plaintiff in error, Thomas M. Fields, was indicted in the Supreme Court of the District of Columbia at the January term, 1905, for embezzlement. The defendant demurred to each of the eight counts of the indictment (Rec., p. 2), and the demurrer was sustained as to counts 4, 5, 7, and 8, and was overruled as to counts 1, 2, 3, and 6 (Rec., p. 4).

The defendant then pleaded not guilty, his trial was begun on May 8, 1905, and on May 15 he was convicted under the third count and acquitted under counts 1, 2, and 6. (Rec., p. 18.)

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He moved in arrest of judgment (Rec., p. 19) and for a new trial (Rec., p. 20), and these motions being overruled he was sentenced, on July 28, 1905, to be imprisoned and kept at labor in the penitentiary for five years (Rec., p. 26).

He appealed to the Court of Appeals of the District of Columbia, which modified the judgment of the Supreme Court of the District of Columbia by striking out the words "at labor," and, as so modified, affirmed it. (27 App. D. C., 433; Rec., pp. 75–85.)

Petitions for a rehearing and for the allowance of a writ of error having been denied by the Court of Appeals, this writ of error was sued out.

## ARGUMENT.

The right to a writ of error from the Supreme Court of the United States is given in section 233 of the District of Columbia Code (31 Stat. L., 1189, 1227), which reads as follows:

> Any final judgment or decree of the Court of Appeals may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteeen hundred and ninety-three, and also in cases,

> without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.

The present case does not involve a pecuniary amount sufficient to warrant the writ of error, nor, indeed, any amount; nor does it involve the validity of any patent or copyright; and the validity of no treaty of the United States, nor authority exercised by the United States, is drawn in question. If this writ of error can be supported, it must be under the clause providing for such writ where the validity of a statute of the United States is drawn in question.

The third count of the indictment under which the plaintiff in error was convicted charges that on November 23, 1903, he and another were receivers under an order of the Supreme Court of the District of Columbia entered November 6, 1894, in an equity cause then pending in said court; that on said November 23, 1903, the receivers had possession of $15,974.07 which had come into their possession by virtue of their office and employment as such receivers; and that on said November 23, 1903, they embezzled the same. (Rec., pp. 1, 2.)

The indictment was brought under section 841 of the District of Columbia Code, which is as follows:

> SEC. 841. Executors and other fiduciaries.—Any executor, administrator, guar-

> dian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding ten years, or both. (Effective Jan. 1, 1902.)

The plaintiff in error attempted in the trial court and in the appellate court, and now attempts in this court, to draw in question the validity of the foregoing statute. An examination of the record demonstrates that this question has not been and can not be properly raised in this case.

In his demurrer to the indictment the defendant sets down, among others, the following points:

> *i*. Neither said section 841 of the said Code of Law for the District of Columbia, nor any other law, applies to receivers appointed before January 1, 1902.
>
> *j*. The said section 841 is unconstitutional and void, because the forfeiture clause thereof operates to deprive the citizens of their property without due process of law; it denies them the equal protection of the

> laws; it inflicts cruel and unusual punishment; it takes private property for public or private use without compensation, and divests vested rights, especially so if given any retroactive effect. (Rec., p. 3.)

In his motion in arrest of judgment he again attempts to raise the question.

> 2. Because Code, section 841, is unconstitutional and void in that it attempts to make a receiver or other fiduciary guilty of embezzling his own property by forfeiting all right or claim to any vested commissions, costs, and charges, and declaring him guilty of embezzlement of the entire amount or value of the money or other property coming into his possession. (Rec., p. 19.)

It is to be noted that the words of the statute are "shall be deemed guilty of embezzlement of the entire amount or value of the money or other property *so coming into his possession and converted or appropriated* to his own use."

In his statement of supposed errors, filed in the Court of Appeals, the appellant says:

> The court erred: 1. In holding Code of the District of Columbia, section 841, to be retrospective and applicable to this case. 2. In holding said section so construed and applied to be constitutional.

We have, then, in both courts, two questions attempted to be raised—one as to the *construction* and *application* of the statute, the other as to the *constitutionality* or *validity* of the statute.

Whether the questions raised in this case refer to the construction and application of the statute, or to its constitutionality or validity, this court has no jurisdiction to review on writ of error the judgment of the Court of Appeals of the District of Columbia, because it is a judgment in a criminal case.

This court, in the case of *Chapman* v. *United States* (164 U. S., 436), construing section 8 of the act of February 9, 1893, since reenacted as section 233 of the District Code, above quoted, held that this act conferred no jurisdiction upon this court to review on writ of error a judgment of the Court of Appeals of the District of Columbia in a criminal case, notwithstanding that the validity of the statute under which the case is prosecuted is drawn in question.

The same doctrine has been announced in the case of *Sinclair* v. *District of Columbia* (192 U. S., 16), where this court, construing section 233 of the District Code, and following the Chapman case, dismissed a writ of error on the same ground.

But it may be argued that the judgment in this case under the statute, namely, section 841 of the Code, involves more than the corporal punishment of the plaintiff in error, and that it involves an amount sufficient to give this court jurisdiction.

It will be observed that section 841 of the District Code provides that any receiver or other officer named in the section into whose possession money or other property of another person may

come by virtue of his office or employment, who shall fraudulently convert and appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon. It then provides that he shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so converted or appropriated to his own use, and shall be punished by a fine or by imprisonment, or by both.

The record in this case fails to show that the forfeiture clause of the statute was invoked or attempted to be invoked.

On the contrary, the record affirmatively shows (pp. 34, 35, and 36) that all commissions, costs, and charges, amounting to about $10,000, had been allowed and paid to the receivers long before the finding of the indictment, and that they were charged in the indictment with the embezzlement of the net sum to be distributed by the court after the allowance of all commissions, charges, and costs.

The indictment charges them with the embezzlement of the net sum remaining for distribution, and seeks no forfeiture, but only punishment for embezzlement. (Rec., pp. 1–2.)

The testimony all relates to the conversion of the net sum chargeable against the receivers exclusive of commissions, charges, and costs.

The judgment condemns the defendant to imprisonment for five years, but neither adjudges nor attempts to adjudge any forfeiture of commissions,

costs or charges, either allowed or claimed. (Rec., pp. 26–27.)

As the Court of Appeals has said (Rec., p. 84):

> (1) While section 841 declares a forfeiture of a receiver's commissions and charges in cases of embezzlement of the funds in his possession, it is not a part of the punishment which the court having jurisdiction of the offence is authorized to impose, and it was properly omitted in entering the judgment upon the verdict and fixing the penalty. If effective, the question of the forfeiture is for the determination of the equity court having jurisdiction in the matter of the receivership when the accounts thereof come on for final settlement.

The forfeiture clause is not and never was in issue in this case. The indictment was not aimed at forfeiture; the judgment contains no enforcement of the forfeiture clause of the statute. The statute does not make forfeiture a part of the punishment; the punishment is by fine or imprisonment, or both. The punishment clause and the forfeiture clause are severable.

But it may be argued that the forfeiture is part of the punishment, and should have been included in the judgment; and that the judgment, not including forfeiture, is void.

In the recent case of *Burton* v. *United States* (196 U. S., 283), a case brought under section 1782, Revised Statutes, which provides that persons con-

victed thereunder shall be incapable of holding any office under the United States, there was no inclusion of this forfeiture in the judgment.

The argument that forfeiture should be included in the judgment reduces the question to one of the *construction* and *application* of the statute, and not of its *validity*. So in the last analysis the questions raised by the plaintiff in error all refer to the construction and application of section 841 of the District Code, and not to its constitutionality.

But such questions can not form the basis of a writ of error from the court.

In the case of *South Carolina* v. *Seymour* (153 U. S., 3 3) a motion to dismiss for want of jurisdiction, a writ of error to the Court of Appeals of the District of Columbia was allowed. While that case was decided in 1894, before the passage of the Code of Laws for the District of Columbia, the act by which it was governed was identical with the wording of the present section 233 of the Code. The question in that case related to the validity of an authority exercised under the United States. But the court held—

> In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States, must be directly drawn in question.

See also *United States* v. *Lynch* (137 U. S., 280); *United States ex rel. Taylor* v. *Taft*, just decided.

Therefore the writ of error will not lie in this case, even though it be distinguished from the cases of *Chapman* v. *United States* and *Sinclair* v. *District of Columbia*, cited above.

It is submitted that the motion to dismiss for want of jurisdiction should be granted.

HENRY M. HOYT,
*Solicitor-General.*

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